

SERVICE DATE - AUGUST 22, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36171

COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY
AND NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION—
PETITION FOR DECLARATORY ORDER—STATUS OF CHICAGO UNION STATION

Digest:¹ The Commuter Rail Division of the Regional Transportation Authority and the Northeast Illinois Regional Commuter Railroad Corporation request a declaratory order that the Board retains jurisdiction over Chicago Union Station and that the Board has authority to prescribe terms for its use and to mediate related disputes. In this decision, the Board denies the petition for declaratory order as premature but provides guidance on issues that the parties should address if a related petition is filed in the future.

Decided: August 20, 2018

On April 6, 2018, the Commuter Rail Division of the Regional Transportation Authority and the Northeast Illinois Regional Commuter Railroad Corporation (collectively, Metra) filed a petition for declaratory order seeking a determination that (1) the Board's jurisdiction extends to railroad properties previously owned by Chicago Union Station Company (CUSCo), and (2) the Board may prescribe terms for Metra's use of Chicago Union Station under 49 U.S.C. § 11102 and mediate disputes concerning the use of Chicago Union Station, pursuant to 49 U.S.C. § 28502, between Metra and the current owner of Chicago Union Station, the National Railroad Passenger Corporation (Amtrak). The Board concludes that issuing the requested order would be premature and therefore denies the petition for declaratory order. The Board, however, will provide guidance on issues that the parties should address in the event a similar petition is filed in the future.

BACKGROUND

Metra is the commuter rail authority that serves the Chicago Metropolitan Area. (Metra Pet. 3.) On average, over 100,000 passengers per week ride Metra trains on routes to and from Chicago Union Station, and "[a]pproximately 83% of the trains operating to and from [Chicago Union Station] are Metra trains." (*Id.*) Metra's use of Chicago Union Station is governed by a 1984 agreement with CUSCo, "and Metra has expended, or has committed to expend, roughly

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

\$129 million in capital contributions toward [Chicago Union Station], and has paid over \$244 million in rent.” (*Id.*) The use agreement between Metra and CUSCo is set to expire on April 30, 2019. (*Id.* at 7.)

Until recently, Chicago Union Station was owned by CUSCo. In 1976, the Penn Central Corporation conveyed its interest in CUSCo, which constituted 50% of all outstanding shares, to Amtrak pursuant to the Final System Plan under the Regional Rail Reorganization Act of 1973 (3R Act), Pub. L. 93-236, 87 Stat. 985. (Amtrak Reply 3 (citing Penn Cent. Corp. v. Chi. Union Station Co., 830 F. Supp. 1509, 1514 (Reg’l Rail Reorg. Ct. 1993)).) In 1984, Amtrak acquired the remaining 50% of outstanding CUSCo shares, such that CUSCo became a wholly owned subsidiary of Amtrak. (*Id.* at 3.) In May 2017, CUSCo and Amtrak merged, with Amtrak as the surviving entity. (Metra Pet., Ex. 3.) As a result, ownership of Chicago Union Station passed from CUSCo to Amtrak. (*Id.*, Ex. 3, at 9.)

Metra sent a letter to Amtrak on January 4, 2018, asking for confirmation that 49 U.S.C. §§ 11102 and 28502 still apply to Metra’s use of Chicago Union Station. (Metra Pet., Ex. 4.) Section 11102 allows the Board to require terminal facilities owned by a rail carrier to be used by another rail carrier, and to “establish conditions and compensation for use of the facilities” if the rail carrier cannot agree on terms. 49 U.S.C. § 11102(a). Section 28502 permits the Board to conduct nonbinding mediation of trackage use requests by public transportation authorities if the public transportation authority and the rail carrier cannot agree on terms of use. 49 U.S.C. § 28502. In a January 25, 2018 response, Amtrak stated that it does not believe that either provision is applicable. (Metra Pet., Ex. 5.)

On April 6, 2018, Metra filed its petition for declaratory order seeking a determination that the Board has jurisdiction over Chicago Union Station and that §§ 11102 and 28502 apply to Metra’s use of the property. (Metra Pet. 1.) Metra argues that, even though Congress exempted Amtrak from most provisions of the Interstate Commerce Act, the statute makes clear that Congress did not intend to exempt Amtrak’s carrier subsidiaries. (*Id.* at 11-12.) Metra argues that CUSCo remained a federally-regulated rail carrier and, as such, CUSCo’s facilities, including Chicago Union Station, remain under the Board’s jurisdiction. (*Id.* at 12-14.)²

Metra argues that the declarations that it seeks are highly relevant to Metra-Amtrak negotiations and will inform whether certain Board-administered remedies extended to Metra and applicable to Chicago Union Station remain available, if needed. Metra further argues that the Board should address the issue of the Board’s jurisdiction now, rather than during any future impasse in negotiations between Metra and Amtrak, because “the Board and members of the

² Metra also states that the merger of CUSCo into Amtrak “may constitute a transaction requiring advance Board authorization,” but that, regardless, “the surviving entity—Amtrak, in this case—would be a rail carrier.” (Metra Pet. 13.)

regulated community have an interest in the certainty” of the legal principles presented by this case,³ and because resolution of these issues at this time by the Board will affect the conduct and “bargaining leverage” of the parties during negotiations. (Metra Pet. 7, 9.)

On April 26, 2018, Amtrak filed a reply to Metra’s petition. Amtrak argues that the petition should be denied because no negotiations for a new terminal trackage rights agreement have taken place, and that the Board should wait until a genuine dispute arises before deciding the issues that Metra raises. (Amtrak Reply 4-5.) Amtrak also disputes that the remedies of §§ 11102 and 28502 are applicable, stating that it is statutorily exempted from the Board’s jurisdiction. (Id. at 9-10.)

By letter filed May 4, 2018, Metra states that negotiation sessions took place on March 15, 2018, and April 20, 2018, and that further negotiations were scheduled for May 23, 2018. (Metra Letter 2.)

On May 8, 2018, Amtrak filed an additional letter reiterating its position that Metra’s petition is premature, while also proposing in the alternative a procedural schedule for additional pleadings to be filed. (Amtrak Letter 1-2.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board declines to issue a declaratory order at this time.

Metra seeks a determination that it can use the Board’s remedies under 49 U.S.C. §§ 11102 and 28502. Section 11102(a) provides that the Board may require a terminal facility “owned by a rail carrier providing transportation subject to the jurisdiction of the Board” to be used by “another rail carrier.” Section 11102(a) also allows the Board to establish conditions and compensation for the use of a terminal facility “if the rail carriers cannot agree” on such terms. Similarly, § 28502 allows the Board to conduct nonbinding mediation “[i]f, after a reasonable period of negotiation, a public transportation authority cannot reach agreement with a rail carrier” on terms and conditions.

³ The Virginia Railway Express (VRE) and the Maryland Transit Administration (MTA), which operate commuter trains in the Washington, D.C., metropolitan area, filed letters supporting Metra’s request for a procedural schedule. (VRE Letter 1, April 20, 2018; MTA Letter 1, April 26, 2018.) BNSF Railway Co., which operates commuter trains for Metra, filed a letter requesting that it be added to the service list in this proceeding. (BNSF Letter 1, May 1, 2018.)

Although Metra argues that these issues are ripe for a Board determination, Metra does not allege that Amtrak currently intends to deny Metra access. Metra's May 4 letter states that the parties have begun negotiations on a new agreement, (Metra Letter 2). Metra also states in its petition that it "has no current plan to seek Board intervention concerning access to the [Chicago Union Station] facilities, and hopes that resort to such remedial measures would be unnecessary." (Metra Pet. 7.) Given that the parties are not at, and may never reach, an impasse nor need to seek Board involvement, a declaratory order is premature at this time. Because it is appropriate for the Board to refrain from intervening in the parties' negotiations at this juncture, the petition for declaratory order will be denied.

Should a related petition for declaratory order be filed in the future, each party should be prepared to address the issues raised in the pleadings and any issues of potential first impression, including the following.

Metra. To show that the remedies under 49 U.S.C. §§ 11102 and 28502 are available to it, Metra would need to address the threshold issue of whether, prior to its merger with Amtrak, CUSCo was a rail carrier subject to the Board's jurisdiction. See 49 U.S.C. § 10102(5). The parties have cited decisions by the Board's predecessor, the Interstate Commerce Commission, referring to CUSCo both as a carrier and a noncarrier. (Metra Pet. 10 & n.13; Amtrak Reply 8 n.7.)⁴ But in none of those cases was CUSCo's rail carrier status a contested issue, nor was it the focus of any of those decisions.

Metra would also need to demonstrate that it is eligible to invoke 49 U.S.C. § 11102, which as noted above permits the Board, under certain circumstances, to require terminal facilities owned by a rail carrier providing transportation subject to the jurisdiction of the Board to be used by another rail carrier. Transportation provided by a local governmental authority is subject to the Board's jurisdiction under § 11102 "only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996." 49 U.S.C. § 10501(c)(3)(B).

Even if CUSCo was a rail carrier subject to the Board's jurisdiction prior to the merger with Amtrak, Metra would also need to address the effect of Amtrak's exemption from most parts of subtitle IV of title 49 under 49 U.S.C. § 24301(c). Under that section, Amtrak is exempt from 49 U.S.C. § 11323, which provides that certain transactions, including certain consolidations and mergers, may only be carried out with the approval and authorization of the Board. Given Amtrak's statutory exemption, Metra would need to explain how the merger of

⁴ In addition to the decisions cited by the parties, CUSCo is also referenced in Burlington N., Inc.—Control & Merger—St. Louis-San Francisco Ry., 360 I.C.C. 788, 797 (1980), and In re Application of Chicago Union Station Co. for Authority to Issue Bonds and of Certain Carriers for Authority to Guarantee Said Bonds, 70 I.C.C. 191 (1921).

Amtrak and CUSCo could be an event requiring Board authorization, and why Amtrak's exemption did not extend to CUSCo, Amtrak's wholly owned subsidiary. Similarly, 49 U.S.C. § 24305(a)(1) states that "Amtrak may acquire . . . facilities necessary for intercity and commuter rail passenger transportation." Metra would need to address this provision, which on its face appears to operate as a substantive grant of acquisition power to Amtrak.

Amtrak. Amtrak would need to do more than simply point to § 24301(c) and assume that the case is over. To be sure, that plain statutory language means that the Board may not regulate Amtrak's fares, nor may it dictate where or how Amtrak serves its passengers. But should this matter be presented to the Board in the future, Amtrak would need to show that the statutory language exempting it from much of the Interstate Commerce Act specifically enables it to take actions that cause **another regulated carrier's facilities to be removed from the Board's jurisdiction without any agency review or approval.** Assuming that CUSCo was a common carrier, for example, Amtrak arguably removed Chicago Union Station from the rail system through its merger with CUSCo with no Board process or involvement. CUSCo certainly is not providing service, as it no longer exists; yet a common carrier is obligated to provide service unless and until the Board grants discontinuance or abandonment authority. 49 U.S.C. § 10903; Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320 (1981). Amtrak would need to show why the Board should not construe the transaction as an unauthorized abandonment and to explain why its own statutory exemption should enable CUSCo to abandon or discontinue service at Chicago Union Station without the Board's authorization.

Finally, although it is appropriate for the Board to refrain from intervening in the parties' negotiations at this time, the Board wishes to remind the parties that the Board's Rail Customer and Public Assistance (RCPA) Program (202-245-0238; rcpa@stb.gov) is available to stakeholders to facilitate informal, private-sector resolution, without litigation, wherever possible.

It is ordered:

1. Metra's petition for declaratory order is denied.
2. This decision is effective on the date of service.

By the Board, Board Members Begeman and Miller.